From this conclusion we respectfully dissent. It may be all very well, whether or not it be conceded that sterilization is necessary to prevent the propagation of inferior children, to take such measures towards habitual criminals, though it might be suggested that it is rather difficult to determine who is an habitual criminal.

Nevertheless, to take from one who has committed the crime of rape but once, all hope of future progeny, when he may go forth from confinement at some future time a reformed man, seems as cruel and unusual a punishment as can well be conceived of. It is a punishment which lasts beyond his term of imprisonment, even to the grave.[23]

LIMITATION OF ACTION AGAINST SURETY ON OFFICIAL BOND.

In the case of *The City of Butte v. Goodwin et al.*,[1] which was an action commenced in May, 1911, against a former city treasurer, who held office from May, 1905, to May, 1907, and the sureties on his official bond, to recover money earned as interest by the city funds during his term of office and retained by him, three statutes of limitation were involved; and it was held that the cause of action was not one arising out of contract in the strict sense of the word, nor one based upon a liability created by statute, but one "upon an obligation or liability, not founded upon an instrument in writing, other than contract," and was barred because it was not commenced within three years, as provided by statute. The period of the statute applicable to actions on bonds was eight years.

In arriving at this conclusion the court decided that the city treasurer, who was not an insurer of the public funds, was a trustee, in point of law, of the funds for the use of the city and accountable for and under an obligation to pay over any profits derived from the use of the trust funds, on a quasi-contractual basis; and that a breach of such obligation constituted a breach of his official bond. But the court further said that there was a breach of the obligation of the bond only because the treasurer "was guilty of a breach of his implied promise to pay over" the

[23] But see an article by Governor Simeon E. Baldwin in 8 *Yale Law Journal*, 371.

[1] 134 Pacific Reporter (Mont.), 670.

interest; "it is this breach of his obligation or legal duty which gives rise to a cause of action. * * * The duty was imposed by law and was not affected in the least by the giving of the bond. * * * If the city has a cause of action against Goodwin, it arises from his wrongful act in retaining money which belonged to the city * * * and not upon the violation of any express contract."

Although the language of the court is ambiguous, it was probably intended to adopt the holding of the California court in the case of *Sonoma County v. Hall*,[2] which is cited. There, an action on an official bond of a county recorder was held to be barred by the statute of limitations which barred a quasi-contractual action against the recorder for breach of his official duty on the ground that when the primary obligation of the officer is barred or in any legal way extinguished, the sureties are relieved in like manner as a guarantor upon a written guaranty to answer for the debt of another would be relieved, when the primary obligation of the principal debtor is barred or extinguished, notwithstanding the written contract. That case is not only opposed to the weight of authority,[3] but the analogy attempted in it stands upon the false premise that the quasi-contractual obligation of the recorder was his primary obligation under the bond.

It is admitted that when the city treasurer failed to turn over to his successor in office the entire amount of the funds of the city entrusted to him, together with the earnings of such funds in the way of interest, he was guilty of a breach of the obligation of his official bond.[4] Immediately, principal and sureties became liable upon that bond and that liability continued until barred by the statute of limitations applicable to the case or until otherwise legally extinguished.

Undoubtedly the treasurer would have been liable on the basis of quasi-contract had there been no bond and would have been liable, on that basis, if the amount of his defalcation had exceeded the amount of the bond, to the extent of such excess; however, the fact that there was a bond, made it no longer necessary to resort to a fiction of law to secure the city in its right to its funds within the amount of the bond. Quoting from the dissenting opinion: "That instrument contains the express stipulation on the part of Goodwin and his sureties that he shall pay

[2] 132 Cal., 589.
[3] See Ames *Cases on Suretyship*, 131 *et seq.*; *Childs on Suretyship*, 239.
[4] See *Brandt on Suretyship and Guaranty*, 2d ed., 534.

over and faithfully account for all moneys coming into his hands belonging to the city. If he has not done this, I cannot understand how it can be that this express stipulation has not been violated, or why that violation is not the basis of his and their liability. * * * Implication may be necessary to the conclusion that the interest belonged to the city; but that the promise of Goodwin to pay over and faithfully account for the city's money is a pure fiction of law, I cannot believe. * * * The concept of duty is undoubtedly back of Goodwin's liability, as it may fairly be said to be 'the root' of all liability whatsoever. Breach of duty in some form is a necessary ingredient of every case; but that does not alter the fact that, when the duty is formally expressed by written instrument, causes of action may be and often are founded, within the meaning of the statute of limitations, upon the instrument, even though no legal necessity existed for the execution of it."

The contract of a surety is undoubtedly a collateral engagement for another, as distinguished from an original and direct agreement for the party's own act, and there can be no liability of the surety without an original liability of the principal;[5] but because that is so it does not follow that the obligation of the principal as a party to the bond is collateral in the sense that it is made to depend upon what would have been his liability in the absence of the written instrument. Suppose the case of a wife living apart from her husband through the fault of the latter, who nevertheless contracts in writing with a merchant to pay the market value of such necessaries as the latter may furnish her; in the event of failure on the part of the husband to live up to his contract, would not the statue of limitations applicable to actions on contract apply, and not that applicable to quasi-contractual actions, although the husband was under a quasi-contractual duty to pay for necessaries furnished his wife?[6] "If Goodwin was required to and did execute the bond, this action * * * is not barred as to him. If his liability endures, that of the sureties endures also." The bond was given for the purpose of making the city more secure, and possibly even to secure the benefit of the longer period of limitation; and the giving of the bond was a condition precedent to the treasurer's entrance upon the duties of his office.

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[5] *Eising v. Andrews,* 66 Conn., 58.

[6] *Hunt v. Hayes,* 64 Vt., 89.

To separate the liability of the treasurer as principal under the bond from his quasi-contractual liability and hold that the latter should alone be considered, whereas the obvious intention was that it should be superseded by the former, is to defeat the very purpose of the bond. The holding of the Montana court was clearly erroneous.